ISSUE 13:
REVISION OF THE ANTI-MONEY LAUNDERING DIRECTIVE
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Revision of the anti-money laundering directive

Editorial

The theme of this issue is anti-money laundering, and in particular the European Commission's proposal for a fourth anti-money laundering (AML) directive. This initiative, if adopted as currently drafted, will for the first time bring the entire EU online gambling industry within its scope. While the EGBA welcomes any and all moves to mainstream the online gambling sector into EU rule-sets – including this important piece of legislation – the devil, as always, will be in the detail. In this issue we have the honour and the pleasure to publish an article by MEP Krišjanis Karinš, who argues compellingly that inclusion in the EU's AML rules will ultimately benefit the online gambling industry itself. To this end, he advocates a seamless and real-time EU-wide system to pinpoint the beneficial owners of companies, and also pushes for enhanced customer e-ID tools. In contrast, Gibraltar gaming and betting chief Peter Howitt looks at the potential pitfalls of the future EU AML regime. As online gambling is inherently cross-border and our operators operate in many jurisdictions, it is key that the directive should not leave too much latitude for member states to avoid 28 different AML rule sets once the new directive is transposed into national laws. Moreover, argues Peter Howitt, we need an EU-level regulator to ensure that national approaches to risk assessment are objective and readily reviewable.

Maarten Haijer, Secretary General

New anti-money laundering rules must be adapted to today's market reality

Krišjanis Karinš, MEP, co-rapporteur for the European People's Party on the fourth anti-money laundering directive

The world is constantly changing, and the criminal world with it. This requires constant upgrades to the anti- money laundering legal framework in the European Union.

The new anti-money laundering directive and regulation bring new challenges to businesses. Of course, new obligations and stricter rules tend to burden companies, but on the other hand they help to prevent or at least minimise the risks of illicit proceeds being channelled through them. Customers and the market benefit as a result. We as legislators must strive to reduce the burden on businesses, minimise the risks of money laundering, and improve the Single Market. It is, in essence, a careful balancing act.

First, I consider that knowing the beneficial owner of both a business and a transaction is of the greatest importance. Money launderers usually hide behind long chains of companies or trusts. The obligation for companies to find out the beneficial owners of their counterparts might be too costly and time consuming. The use of national company registers to find out the beneficial owners would significantly aid the process. These registers should be interconnected (as already set out in the Directive 2012/17/EU), contain up-to-date information, and be accessible by the authorities and obliged businesses.

"Now that the online gambling sector is growing, methods, such as e-verification tools should be recognised and promoted by the authorities in order to ensure effective customer due diligence," Krišjanis Karinš MEP.

Second, modern technology provides

"The risk based approach would serve the goal of limiting money laundering."

businesses with very effective tools to verify their customers and minimise the risks of money laundering. The use of such technologies would allow companies to reduce resources used to verify each customer. Now that the online gambling sector is growing, methods, such as e-verification tools should be recognised and promoted by the authorities in order to ensure effective customer due diligence. Customers would also gain from such improvements through greater security.

Third, I believe that the risk based approach would also serve the goal of limiting money laundering. Who else knows what happens in their 'backyard' if not the businesses themselves? The same applies to the competent authorities in the member states. The ways and means how to launder money differ widely over various business sectors and member states, therefore limited resources should be used in the most effective way possible.

We need all businesses to remain on an equal footing. Once a tax base is set, all players should adhere to the same rules. This in turn will increase investments and create jobs – the basics needed for the increased well-being of our society. Combating money laundering just makes sense for business.

Krišjanis Karinš is a Latvian member of the European Parliament from the Unity (Vienotiba) party.

The proposed fourth anti-money laundering directive (the '4th Directive') – the GBGA's view

Peter Howitt
Chief Executive,
Gibraltar Betting and Gaming Association

Gibraltar's online gambling operators are currently subject to specific anti-money laundering (AML) guidance, that deals with the risks arising within the online gaming sector. Under the proposed Directive, currently being debated in the European Parliament, the industry will now be directly subject to AML legislation as a result of a specific extension to the entire gambling sector in the 4th Directive.

The principle concerns of operators are the multi-jurisdictional issues which arise considering the inherent cross-border nature of the online gambling sector. The Directive should aim to achieve consistency and ease of compliance for proper lawful business practices across the EU. However, based on previous AML experience, it appears that operators are still going to be left with the task of deciphering the law in each member state and to comply with very different regimes once the new Directive will have been implemented.

"The principle concerns of operators are the multi-jurisdictional issues which arise considering the inherent cross-border nature of the online gambling sector."

Under established AML principles, usually the AML law of the home member state where an operator is based applies to its activities, but in as many as 9 member states, the AML provisions of the country where the customer is located may also be applicable. Sometimes, this is also the case for operators who have local agents, group companies and even commercial partners. This will undoubtedly increase the confusion to which foreign financial investigation unit the reporting should be done.

In addition, the checks necessary for Politically Exposed Persons (PEPs) are also a major issue where customers are based in multiple territories as checks for local, foreign or international political exposure must be undertaken. Crucially, and frustratingly, it is rarely made obvious which law applies and accepted practice is often not published or known outside of banking and similar services. The consequent compliance costs of managing AML requirements in a fragmented field are disproportionately high.

The GBGA is advocating that gambling operators and associations ensure that the industry lobbies effectively for tailored national and supra-national risk based approaches relating to online gambling. It is key that this is done or the industry will again suffer with unclear parameters for complying with AML laws. The necessity for change to

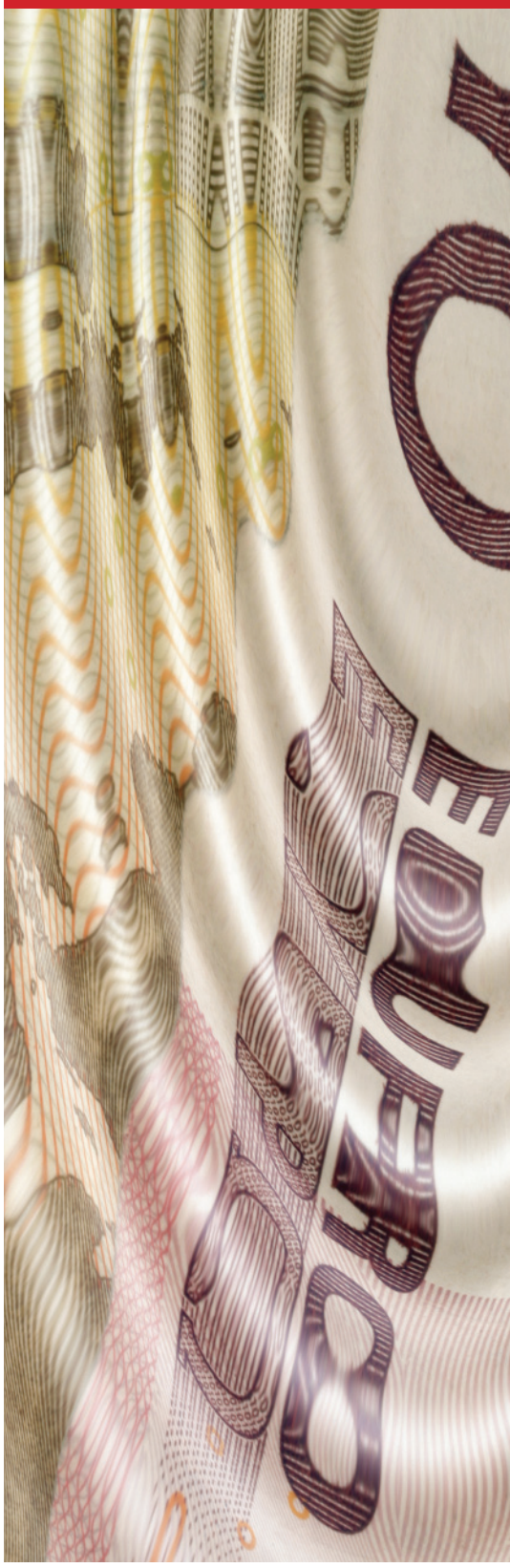
the 4th Directive is even more apparent when there is no obvious supra-national body for gambling unlike say banking and electronic money (where the EBA will be responsible). This deficit in the Directive is likely to lead to sectoral discrimination, a lack of coherence in dealing with cross-border conflicts and policy rather than risk based transposition and enforcement. These concerns can already be evidenced by the stricter limits for due diligence suggested to be applied for gambling services (€2000 threshold proposed in the draft 4th Directive) and its wording about increased risk of money laundering from gambling. It is ironic that in a Directive that purports to move to an evidence driven risk based approach to AML there is such striking language that is not supported by any evidence of increased risk.

"A supra-national authority responsible for the gambling sector is a must-have."

The 4th Directive goes some way to move away from the 'tick-box' approach which was difficult to apply to the online gambling sector and did not achieve the aims of the legislation. However, there has been no attempt to ensure that AML legislation EU wide is consistent and easily applied. Operators will not be in a position to easily, and properly, assess what is required of them in each member state. Essentially, the 4th Directive means that with the risk-based approach expected, states are left with considerable leeway to formulate AML law. In turn operators also have leeway in formulating policies that comply with national law which it takes into account that there are certain transactions where the risk of money laundering is limited and others where there are enhanced risks. However, the potential for significant differences in the AML law of each member state remains.

The addition of online gambling to the 4th Directive without greater consideration of cross-border coherence suggests that more work is required to ensure that with increased obligations for the online gaming industry there are also increased rights (including of representation). It is imperative that there is more clarity on cross-border issues and coherence of dialogue and co-operation between the industry and the various supervising authorities, as there is a high risk that courts will not wish to intervene where a member state declares that legal preventative action against operators is necessary based on AML, even if such action is not risk driven or evidence based. A supra-national authority responsible for the gambling sector is therefore a must-have.

> "The potential remains for significant differences in the AML law of each member state."



In each issue of EGBA News, Professor Dr. Dr. h.c. Claus-Dieter Ehlermann provides his opinion on legal questions at the heart of the online gaming debate.

The legal view

Court reconfirms prior jurisprudence in new *Biasci* ruling

Professor Dr. Dr. Ehlermann, Senior Counsel at WilmerHale and a former Director-General of the Legal Service of the European Commission.

With the recent *Biasci* ruling regarding the Italian gambling legislation (Joined Cases C-660/11 and C-8/12), the Court of Justice of the European Union reconfirmed once again its now clear interpretation of how the Treaty rules apply to gambling legislation. Based on the established jurisprudence, some of the key EU law requirements relate to:

Consistency

While due to the lack of sector-specific EU legislation, in principle, each Member State is free to define its own level of protection, its regulation must not be discriminatory, must not go beyond what is necessary and must be suitable to achieve the identified public interest objectives. Any restriction must moreover apply consistently across the entire legislation. For instance, one sector of gambling products must not be regulated in a stricter manner than another sector when the risks related to the sectors are similar or identical. Member States are further obliged to "sector-internal" consistency, meaning that they must not, in any particular gambling sector, on the one hand invoke public policy reasons as justification for restrictions of the market freedoms while on the other hand allowing incumbents to expand their offer and advertise gambling products in a manner surpassing the need to channel gambling activities away from the black market into the licensed offer.

Requirement of establishment

Gaming licenses must be granted irrespective of where in the EU/EEA the operator is legally domiciled. Requiring a company to establish a seat in the host Member State violates the fundamental freedom of establishment and goes beyond what is necessary to achieve the aim of strict control by public authorities. The CJEU has repeatedly ruled that the mere fact that a local firm can be supervised by the national regulator more easily does not constitute a sufficient argument to require a local company seat. The principle of proportionality also strictly applies to provisions which require a certain legal form or a minimum share capital for operators wishing to obtain local licenses. The same is true for instance for the obligation of having a local server or data warehouse physically placed in the local jurisdiction. It creates additional maintenance and other costs, which cannot be justified where the level of appropriate surveillance can be obtained using less intrusive means.

Licensing procedures and limits

The Court has set up clear principles on how the allocation of gambling licenses must be decided. In line with CJEU case law the procedure as such must be made public and the award criteria must be objective, transparent and non-discriminatory. In addition, any person affected by a restrictive measure must have the opportunity to challenge it before the appropriate body.

In line with this existing jurisprudence is the confirmation found in the *Biasci* ruling that limits on the number of gambling licenses are a restriction to the freedom to provide services. According to the Court any such limitation, although not wrong *per se*, should be justified in detail by the Member State. It must be remembered that the burden of proof for these and other restrictions falls on Member States and that the proof requires sufficient evidence, data and/or statistics.

The requirements outlined above have been developed by the CJEU solely in rulings on preliminary questions put forward by local courts; the CJEU itself has actually never been called upon by the Commission to rule on the specifics of a case. However, given the consistent approach by the Court to the application of EU law in this sector, the Commission is on safe legal grounds to institute infringement proceedings against those Member States that continue to breach EU law.